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in the Supreme Court of the United States

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH AND CONVERSATION OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP AND ARREST 3) THAT ALL SO-CALLED "PROFILE TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE, UNDER *REID V. GEORGIA*, ___ U.S. ___, 100 S.CT. 2752 (1980) and 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN *UNITED STATES V. MENDENHALL*, ___ U.S. ___, 100 S.CT. 1870 (1980); *SCHNECKLOTH V. BUSTAMONTE*, 412 U.S. 218 (1973) AND *TERRY V. OHIO*, 392 U.S. 1 (1968) AND IS A MISAPPLICATION OF THE FOURTH AMENDMENT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida, the Appellee in the District Court of Appeal of Florida, Third District, and prosecution in the Florida trial court. The Respondent in the Supreme Court of Florida, the Appellant in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references are made in this brief:

(R) For the Record-on-Appeal transmitted under separate cover.

(T) For the transcript of proceedings transmitted under separate cover.

(A) For the joint appendix submitted herewith.

(PA) For the Appendix to the Petitioner's brief submitted herewith.

Substantial preliminary assistance to the undersigned in the research for this brief was submitted by E. M. Edson of the office of the Chief Counsel for the Drug Enforcement Administration.

I

OPINIONS BELOW

The opinion of the District Court of Florida, Third District, *en banc*, reversing the Florida trial court's denial of the Defendant's Motion to Suppress and reversing the Florida District Court panel opinion reported therein, is reported at *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980). The opinion of the Florida Supreme Court denying the State's Application for review (Adkins and Alderman, JJ. *dissenting*), is reported at *State v. Royer*, 397 So.2d 779 (Fla. 1981). There are no official reporters for citation to these opinions.

II

JURISDICTION

On March 19, 1981, the Supreme Court of Florida with two Justices dissenting denied the State's timely application for review. On May 19, 1981, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including June 16, 1981. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. *Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979) *approved and adopted, Hetland v. State*, 387 So.2d 963 (Fla. 1980). *See, also* §933.19 Fla. Stat. [adopting *Carroll v. United States*, 267 U.S. 132 (1925)]. The constitutional issues herein were presented and fully argued at all levels of the proceedings below.

III

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV

STATEMENT OF THE CASE

The Defendant, MARK ROYER, was charged by information with unlawful possession of marijuana and possession of marijuana with intent to sell, arising out of his

attempt to transport sixty-five (65) pounds of marijuana in his luggage through the Miami International Airport on January 3, 1978. R1-R2. The Defendant filed a Motion to Suppress the marijuana, which the trial court denied after a hearing. The trial court denied the Defendant's Motion to Suppress upon two alternative grounds: 1) that the Defendant voluntarily consented to the search of his baggage and 2) that the actions by the officers were constitutionally reasonable based upon the facts, which they observed considered together with their experience and training and the exigencies of the situation. *See*, 115A-116A.

At the hearing upon the Motion to Suppress, the State produced one witness, Detective William Johnson, of the Dade County Public Safety Department. 16A-17A. Detective Johnson testified that he was on duty at the Miami International Airport on January 3, 1978, observing persons purchasing tickets and meeting flights from "target" cities. 18A. Detective Johnson testified that Miami is a high source city for cocaine and marijuana. 19A. Johnson said his job is to intercept narcotics entering interstate commerce leaving Miami International Airport. 57A-58A. Johnson said that he is trained in the DEA drug courier profiles and works at the airport observing passengers eight (8) hours a day and five (5) days a week. 20A. He testified that a DEA drug courier profile was developed based upon actual case studies and that the airport narcotics unit has developed a similar profile for Miami International Airport based upon the Detectives' experience. 28A-29A. Johnson testified that the touchstones of a profile generally consist of 1) casually dress; 2) twenty-five to thirty-five years old; 3) one way ticket; 4) paying for ticket in *cash* only; 5) using no identification; 6) using no other means of identification such as credit cards or checks; 7) traveling to a "target" city; 8) carrying American Tourister luggage; 9) placing false identification on the luggage labels required by federal airline regulations and 10) carrying large amounts of cash. 28A-29A; 36A-39A. Detective Johnson testified that *cash only* and the lack of identification is

central to the couriers efforts to avoid detection and to avoid detection by traveling under an alias. 36A. Detective Johnson testified that the failure of a passenger to properly identify himself and his luggage is a violation of the airline regulations governing air travel. 38A. He also, testified that he maintains constant contact with police departments in major cities and the Federal Drug Enforcement Administration concerning drug couriers and their activity. 21A-23A. Johnson said that he has worked closely with the Los Angeles and Detroit DEA units and in particular Paul Marconi in developing Miami's profile. 21A-22A.

On January 3, 1978, at about noon, Detective Johnson observed the Defendant at the National Airlines ticket counter at Miami International Airport. 25A-27A. *Johnson testified without objection that in the Detectives' training and experience the Defendant's appearance and demeanor attracted his attention and the attention of Detective Magdelena.* 27A-28A. The Defendant was extremely nervous uneasy, pale and appeared to be looking about to see if anyone was watching him. 29A-30A. Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. 30A-32A. Detective Johnson testified, that the Defendant was carrying two (2) American Tourister bags one of which was brand new. 27A. The bags were very heavy and the Defendant produced an extremely large roll of cash to pay for his ticket from his front pocket. 33A-35A. Johnson said that they observed that the Defendant was given luggage labels *required by airline regulations* and the Defendant wrote the name, *"Holt"* and "La Guardia" on the identification labels. 37A-38A. Detectives Johnson and Magdelena approached the Defendant identified themselves as police officers and asked the Defendant if he had a moment to talk and the Defendant replied "yes" that he did. 40A-41A. Detective Johnson indicated that in his experience and training

when somebody they approach refuses to talk for a moment, they just get on the plane and leave. 73A.

The Defendant upon request produced his driver's license from New Jersey and his plane ticket.[1] 41A-42A. The Detectives immediately noted the discrepancy in names between the Defendant's name and address and that which he had given the airline for his ticket and bag. 42A-43A; 81A. The Detectives inquired as to the discrepancy and the Defendant said that he had not made the reservation. 43A. Johnson testified that he told the Defendant that they suspected he was transporting narcotics. T26-T27. Johnson said, that they then asked the Defendant if he would accompany them to a room a few feet away for further discussion. 44A-45A. Johnson testified that the detectives asked the Defendant if he would accompany them and he did. 68A. Johnson testified that the Defendant was very cooperative. 72A-73A.

The room involved is adjacent to and part of the Air Florida Stewardess lounge at Miami International Airport. 45A. Johnson testified that they wanted to continue the discussion out of the crowded general airport concourse to avoid possible embarrassment to the Defendant and to protect the public from possible violence. 51A-52A. The detectives were courteous at all times; they did not threaten the Defendant in any way; the entire transaction took only a few minutes; the transaction was purely conversational in tone; the Defendant indicated that he understood all that was said and there was no physical contact with the Defendant at any time. 52A-56A.

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[1]The Officers apparently retained the Defendant's plane ticket for the baggage information in the absence of a request for its return. *See*, 68A. The ticket was however, left in the office with the Defendant, when Detective Johnson retrieved the Defendant's bags. 71A. The Defendant however, evidently retained his license since he indicated that it was with the other matters from his pockets. *See*, 87A.

Johnson said that in the room, *which was about forty (40) feet away,* they ask the Defendant if they could have his consent to open the suitcases that he had been carrying. 47A. *They again said,* that they suspected him of transporting narcotics.[2] 47A. Johnson indicated in his testimony that if the Defendant had refused, the detectives would have sought a search warrant.[3] *See,* 56A. In response, the Defendant produced a key and unlocked the white suitcase he was carrying and said that he didn't know the combination to the other bag, but that they could "go ahead" and open it if they wanted to. 47A. The bags were opened and contained sixty-five (65) pounds of marijuana. *See,* 53A. Johnson said that the Defendant *never* indicated he *did not* want to cooperate. 72A-73A. The entire transaction took about ten (10) to fifteen (15) minutes. 50A. After being read his Miranda rights and indicating that he understood, the Defendant agreed to and talked without an attorney. 54A. On cross-examination Counsel for the Defendant sought to attack Johnson's integrity by saying that Johnson is not interested in whether his arrests are valid or not. 58A.

The Defendant, a twenty-two (22) year old, college educated, adult male, with a four year degree in Communications, (*see,* 55A; 88A). said that the detectives had approached the Defendant and *asked* if they could talk with him. 78A-79A. The Defendant also said, that he produced his ticket *voluntarily* and then his identification. 78A-79A.

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[2]Johnson indicated in subsequent testimony that he asked the Defendant for consent to open the suitcases and after the conversation with the Defendant, Johnson went and got the bags. *See,* 74A; 46A-48A.

[3]Intrinsic here must be the potential for any cumulative information that the detectives could also have obtained from a narcotic dog or *further* investigation of the facts known as for example in a "call-back" number and the alias "Holt." *See, e.g. Mata v. State,* 380 So.2d 1157 (Fla. 3d DCA 1980); *Sizemore v. State,* 390 So.2d 401 (Fla. 3d DCA 1980).

He testified that the officers had noted the discrepancy between his identification and the name that he gave the airline. 81A. However, the Defendant's story as presented to the trial judge was that the detectives never asked him for his consent to open his bag. 94A. He said, that he was *told* to come with them to the room. 81A. He said that once in the room they *told* him to empty his pockets and to open his suitcase. 85A-86A. The Defendant said that he didn't leave because he was afraid of getting hurt by the officers. 86A. However, he then later said that the officers were courteous. 90A. The Defendant refused to testify as to who he claims made the airline reservation and refused to testify as to whether "Holt" exists or not. *See*, 90A-91A. The Defendant offered no explanation for, why if the Detectives had demanded that he empty his pockets, they then asked *him* to open the suitcase with the key. *See*, 94A-95A. *The Defendant affirmatively testified however, that in the room, he was not under arrest.* 84A.

The trial Court below, having heard all the witnesses and evidence before it and viewing the demeanor of Detective Johnson and the Defendant and having to resolve the conflicts in the evidence, *rejected* the Defendant's testimony, which conflicted and found, as a matter of fact, that the Defendant had consented to the *entire* transaction. 114A-115A. The Court further found that the situation was *exigent;* the Detectives had no time to get a warrant to search the luggage because in a few minutes the Defendant would be gone and it was constitutionally reasonable for the detectives to approach the Defendant, inquire and search the luggage. *See*, 115A-116A.

After accepting briefs of the parties and hearing oral argument, on December 28, 1979, the original panel herein *affirmed* the Defendant's conviction. The panel opinion held, 1) that there is no requirement in the law that the Defendant be advised of his right to refuse consent; 2) that voluntary conversation with police officers is without constitutional

impact; 3) that in the totality of the circumstances the trial court could have found voluntary consent; 4) that *Taylor v. State*, 355 So.2d 180 (Fla. 3d DCA 1978), is distinguishable because in that circumstance, the officers had overtly coerced the consent by beginning the same search that they were requesting; 5) submitted that its holding is inconsistent with *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979); 6) citing *inter alia*, *Carroll v. United States*, 267 U.S. 132 (1966) and *United States v. Chadwick*, 433 U.S. 1, (1977), held that an arrest and detention of the Defendant was proper, where in the Detectives experience he *was* a drug courier and 7) that the trial court's alternative holding that a search of the Defendant's luggage was constitutionally reasonable is supported by the record and lawfully correct. *See*, 389 So.2d at 1009-1015.

The dissent to the panel decision would have reversed the trial court because, a) the Defendant was "arrested," when he was asked to go to the "police room" (citing *Frost, supra*); b) the Defendant's arrest was unlawful because even if the Detectives had articulable suspicion, they did not have probable cause; c) the Defendant's consent was given while unlawfully detained (citing *Frost*) and therefore, his consent was presumptively "tainted" irrespective of the circumstances, because he was not warned of his right to refuse as in *Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979) and [required] by *Taylor v. State, supra. Id* 1014-1015.

A petition for rehearing *en banc* was requested by the *dissent* upon a petition by the Defendant. *Id* at 1015. The petition was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court *reversed* the panel opinion *and* the trial court.

The fundamental error in the *en banc* court opinion, which authored by the dissent to the panel opinion, is reflected

in its view of the *factual questions* of *consent* found by the trial court and *affirmed* by the *panel opinion*. *The en banc court opinion refers to the factual finding of consent by the trial court as "THE ALLEGED CONSENT." Id* at 1019. Citing *Frost, supra*, the *en banc* opinion then takes the view that *any movement* from the airport concourse to the room forty (40) feet away under *Dunaway v. New York*, 442 U.S. 200 (1979) was an *arrest*. *Id* at 1018-1019. The Court then ignores any possibility of a brief detention of the Defendant for investigation. The Court states that the alias used by the Defendant was *not* a suspicious circumstance in the experience of the Court and rejected Detective Johnson's training, experience and actual observations of the Defendant as "amateur psychiatry" to be, "totally disregarded"[4]. *Id*, at 1016 n. 4; 1019 n. 11.

The *en banc* court then takes the position that *Reid v. Georgia*, ____ U.S. ____, 100 S.Ct. 2752 (1980) precludes all stops based upon all profiles and states further that *United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980) is *"contra."* *Id*, at 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Defendant was illegally detained, his consent was therefore, automatically invalid. *Id* at 1018. The court stated that there was no precedent to sustain the trial court. *But see, e.g., United States v. Mendenhall, supra*. On October 21, 1980, the State's Motion for Rehearing and certification was denied. On March

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[4]As noted above however, Detective Johnson, was *accepted* by the trial court as an experienced airport courier/narcotics officer and he testified that *cash only* and the lack of identification is *central* to the couriers' efforts to avoid detection and to avoid detection by traveling under an alias. Johnson also testified that the Defendant was extremely nervous, unease, pale and appeared to be looking about to see if anyone was watching him. Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being *detected* rather than that he was a "white knuckle" flyer.

18, 1981, the Florida Supreme Court, with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's *en banc* decision. *State v. Royer*, 397 So.2d 779 (Fla. 1981).

V

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful and good faith interdiction of *chronic* narcotics traffic. *See, United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert. den.*, 449 U.S. 1127 (1981).

The mere approach of police officers and engaging the Defendant in conversation is not prohibited by the Fourth Amendment.

Where there is no restraint placed upon the Defendant's right to walk away, there is neither a "stop" nor "detention" within the meaning of the constitution, even though the inquiry may be investigative in nature. *See, United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980). The Fourth Amendment does not require that a policeman who lacks the precise level of information for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape. *See, Adams v. Williams*, 407 U.S. 143 (1972).

There is substantial competent evidence, which the trial court chose to believe, that the Defendant freely and voluntarily consented to speak with the officers; to permit an examination of his ticket and license; to reconvene in an adjacent room and to the examination of his luggage. The

District Court as an Appellate Court was therefore mistaken in substituting its view of the facts, for that of the trial court. *See, United States v. Mendenhall, supra; Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

Consistent with traditional analysis, Detectives Johnson and Magdelena had articulable suspicion for a brief detention of the Defendant for further investigation and/or probable cause to believe that the Defendant was attempting to transport illicit narcotics through Miami International Airport. *See, United States v. Mendenhall; Brinegar v. United States,* 388 U.S. 160 (1947); *see, also, United States v. Cortez,* ____ U.S.____, 101 S.Ct. 690 (1981); *Draper v. United States,* 358 U.S. 307 (1959).

Any detention of the Defendant for further investigation did *not* rise to an arrest because of limited movement to a room forty (40) feet away. The movement to the room did not become an arrest, where danger to the public in a crowded airport and avoiding possible embarrassment to the Defendant are among legitimate law enforcement concerns and where the transaction lacks any traditional indicia of an arrest *and* the Defendant subjectively stated that he was *not* under arrest in the room. *See, Michigan v. Summers,* ____ U.S. ____, 101 S.Ct. 2587 (1981).

Any movement of the Defendant's luggage after the Defendant had given it to a third party is constitutionally irrelevant. The search of the Defendant's luggage was proper in view of the special character and nature of the airport transaction and law enforcement interest and under the exigency exception to the warrant requirement. *See, Carroll v. United States,* 267 U.S. 132 (1925).

VI

ARGUMENT

1) THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT.

To extend the effect of the exclusionary rule to the present circumstance and similar causes in the future would amount to only blind imitation of the past. Even in that imitation, it is not possible that the Framers of the Constitution ever intended two hundred years later that the prohibitions of the Fourth Amendment would be extended to release airport narcotics couriers, rapists, murderers and other felons in the face of unimpeachable evidence of their criminality, which has been seized in good faith.

The rationality of the Exclusionary rule has been assailed since its inception.[1] Additionally, at least four members of

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[1]*See, e.g.*, Williams, "The Exclusionary Rule under Foreign Law-England", 52 J.Crim.L. 272 (1961); Barrett, "Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan," 43 Calif.L.Rev. 565 (1955); Burns, "Mapp v. Ohio: An All-American Mistake," 19 DePaul L.Rev. 80 (1969); Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif.L.Rev. 929, 951, 952-954 (1965); F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1-84 (2d ed., 1968); LaFave, "Improving Police Performance Through the Exclusionary Rule" (pts 1 & 2), 30 Mo.L.Rev. 391, 566 (1965); LaFave & Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich.L.Rev. 987 (1965); N. Morris & G. Hawkins, "The Honest Politician's Guide to Crime Control, 101 (1970); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970); Plumb, "Illegal Enforcement of the Law," 24 Cornell L.Q. 337 (1939); Schaefer, "The Fourteenth Amendment and Sanctity of the Person," 64 Nw.U.L.Rev. 1 (1969); Waite, "Judges and the Crime Burden," 54 Mich.L.Rev. 169 (1955); Waite, "Evidence—Police Regulation by Rules of Evidence," 42 Mich.L.Rev. 679 (1944); Wigmore, "Using Evidence Obtained by Illegal Search and Seizure," 8 A.B.A.J. 479 (1922); 8 J. Wigmore, *Evidence* §2184a (McNaughton rev., 1961).

the present Court have also noted the grave defects in the rule and have urged that the rule should be substantially modified. *See, e.g., California v. Minjares*, ____ U.S. ____, 100 S.Ct. 9 (1981)(Rehnquist, J. and Burger, J., *dissenting*); Stone v. Powell, 428 U.S. 465, at 496-502 (1976) (Burger, J., concurring); *Id*, at 537-542 (White, J., *dissenting*); *Brewer v. Williams*, 430 U.S. 419, at 420-429 (1977) (Burger, J., *dissenting*); *Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., *concurring*). In *Irvine v. California*, 347 U.S. 128, at 136 (1954) the Court openly recognized the patent defects in the rule:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one law-breaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

Although the undersigned would have great difficulty in restating the problem more thoroughly or more eloquently than the Chief Justice and Justices White, Powell and Rehnquist, the State considers that this Honorable Court should also consider the substantial message of concern and dissent from lesser courts and the rising costs of the rule to the public. Disenchantment with the seeming disarray of conflicting views upon the application of the rule and the avoidance of the truth-seeking process can be found at any level of the judicial system. In *United States v. Andrews*, 474 F.Supp. 456, at 462 (D.Colo. 1979), the learned trial judge wearily but conscientiously reviewed again the bulletins of the latest changes in the application of the rule and concluded that upon the facts before the court, the cause could have gone either way, to wit:

"This is not the appropriate case in which to consider the philosophical underpinnings, if any, of the exclusionary rule, but the "chancellor's foot veto" which was viewed with such great alarm in *United States u Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) *seems presently to be inextricably stuck in the Serbonian bog of searches and seizures.* As the Ninth Circuit so ably demonstrated in *Fannon* and *Gummerlock, supra*, this case could have gone either way. I must admit to a feeling of considerable foolishness in each effort to determine whether a constitutionally protected zone of privacy exists in a briefcase or a cigarette package or a cardboard box. *I am tempted to pray that when I awake there will be no exclusionary rule.* I am, however, bound by my best perception of what the law presently is rather than what it may become.

"IT IS ORDERED that the defendant's motion to suppress is denied."
[Emphasis added]

Similarly, in *M.A.P. u State*, 403 So.2d 1384, 1387-1388 (Fla. 2d DCA 1981) Chief Judge Ott, in dissent found that the "Serbonian bog" of the exclusionary rule lead to an injust and intolerable result:

"This would be a wonderful world if there were no crime, no need for police officers and no such thing as a search or seizure. But there is crime, increasingly, and we hire efficient police for our protection. It isn't us against the police, but us against the criminals, and the police are but our soldiers in that war. Surely we know by now what happens when troops are committed to battle with their hands tied.

* * *

> "It is all very well to pursue pure freedom in ivory-tower meditation, and I most heartily subscribe to the proposition that individual freedom must be as pure as practicality permits, but let's not lose sight of the limiting factors imposed by the real world."
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> *Id.* at 1387-1388.

The opinions from divergent courts in *Andrews* and *MAP* serve to illustrate the gravity of the problem. Dutiful and conscientious judges follow this Court's directives but repeatedly raise grave questions as to the admitted high and increasing price and manifest injustice of the rule. In the legal "trenches," where the rule is applied daily in cases which this Court will never hear, conscientious Courts are having increasing difficulty in applying what has become a wooden and "Draconian" rule, upon an unsuspecting public.[2] *See, Stone v. Powell*, 428 U.S. at 496-497 (Burger, J., concurring).

At the same time, it cannot be seriously disputed that illicit narcotics traffic and gambling are the very backbone of organized crime, *See, Iannelli v. United States*, 420 U.S. 770 at 786-791 (1975); *Gore v. United States*, 357 U.S. 386, at 388-393 (1958), and that the violence and corruption of narcotics traffic is tearing at the very fabric of our society.[3] *See,*

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[2]The pressure upon the courts below has only increased as the courts have become more visible and the public becomes more familiar with the role of the judiciary. *Cf, Chandler v. Florida*, ___ U.S. ___, 101 S.Ct. 802 (1981); *see, also Richmond Newspaper v. Virginia*, ___ U.S. ___, 100 S.Ct. 204 (1980).

[3]A noted real estate analyst has testified before the Senate that organized crime will soon control real estate in South Florida at the current rate of investment of narcotics monies by organized crime. *See,* PA45 "The Miami Herald," December 13, 1979 "ANALYST: DRUG CASH SENDS HOUSE PRICES HIGHER." The sociological information inherent in the Appendix to the Petitioner's brief was argued by the State below and is an essential element in weighing the issues before the court. *See,*

PA1-PA32, SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, 95th CONG. 2d SESS., REPORT ON PROBLEMS OF LAW ENFORCEMENT AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA (Comm. Print 1978); *see, also,* PA33-PA67 (media reports of violence and corruption of drug traffic and its effects in Florida). Indeed, even in the Court below, the State's presentation drew substantial concern from a member of the Court:

> "[T]he public interest served by the temporary seizures of air travelers under discussion, particularly at the Miami International Airport, is without a doubt an immensely important one. Indeed, any fairminded person must surely conclude, in view of the overwhelming evidence available, that South Florida is being inundated with a multi-million dollar narcotic drug traffic derived in large part from sources outside the country. That traffic by any standard is corrupting this society and simultaneously bringing with it an unprecedented degree of violence and murder which is not unknown in the Great Miami area."

Royer v. State, 389 So.2d 1007, at 1023 (Fla. 3d DCA 1980) (Hubbart, J., concurring). The cost to society of releasing narcotics traffickers as in the case at bar, in the face of unimpeachable evidence of their guilt; is grieveous and grossly disproportionate to the single, theoretical benefit of the rule.

(Footnote 3 Continued)

the considerations and judicial analysis in, Brown v. Board of Education, 347 U.S. 483 (1954); *see also, Royer v. State*, 389 So.2d 1007 at 1023-1024, n5 (Fla. 3d DCA 1980) (Hubbart, J., concurring).

Undeniably, this Court created the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961) and therefore has the authority to repeal or modify it. The exclusionary rule is *neither* an "imperative of judicial integrity" *nor* a "constitutional requirement." *United States v. Calandra*, 414 U.S. 338 (1974); *see, also, United States v. Salvucci*, ____ U.S. ____, 100 S.Ct. 2547 (1980); *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Caceres*, 440 U.S. 741 (1979); *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971). The rule is only a judicially created remedy whose sole purpose is to *deter* Fourth Amendment violations. *Calandra*, at 348. Therefore, as Judge Friendly observed, the rule may be judicially modified or repealed as the law becomes more sophisticated:

> "[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach."

Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif.L.Rev. 929, 952-953 (1967); *see, also, Bivens*, 403 U.S. at 421 (Burger, J., *dissenting*). Indeed as Holmes observed, it is the *duty* of the Court to modify or repeal a rule where its purpose has become only a blind imitation of the past:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Holmes, "The Path of the law," 10 Harv.L.Rev. 457, 469 (1897).

There *is* no evidence that the rule as it presently exists has any deterrent effect at all. *See, e.g., Oaks, Studying the Exclusionary Rule in Search and Seizure,* 37 U.Chi.L.Rev. 665 (1970); *Schlesinger, The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?* 62 Jud. 404 (1979); *Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. Legal Stud. 243 (1973); *see, also, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 368, 411-416 (1971) (Burger, J., *dissenting*); *but see, Cann and Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy,* 23 How. L.J.299 (1980); *Limiting the Application of the Exclusionary Rule: The Good Faith Exception,* 34 Vand. L.Rev. 213, at 220 n. 51 (1981). Even the best appraisal by the proponents of the rule is that empirical data is *inconclusive* as to deterrence. *See, Cann and Egbert, supra.*

Directly applicable to our present analysis, however, the rule clearly has no deterrent effect at all where a law enforcement officer has acted in a good faith belief that his actions are constitutionally correct. In *Stone v. Powell,* 428 U.S. at 539-540, Justice White eloquently observed:

> "In most of these situations, it is hoped that the officer's judgment will be correct; but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, *no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question.* It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that

there was not probable cause to make the arrest and to seize the evidence offered by the prosecution.

* * *

"In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. *Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.*

"*When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.* The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted." [Emphasis added].

See, also, Stone v. Powell, 428 U.S. at 499-503 (Burger, J., *concurring*); *Brown v. Illinois*, 422 U.S. at 610-612 (Powell, J., *concurring*); *Brewer v. Williams*, 430 U.S. at 420-429 (Burger, J., *dissenting*); *Bivens*, 403 U.S. at 411-420 (Burger, J., *dissenting*); *United States v. Williams*, 622 F.2d 830, at 840-843 (5th Cir. 1980) (*en banc*), *cert. den.*, 449 U.S. 1127 (1981); *Ball, Good Faith and the Fourth Amendment: The "Reasonable Exception to the Exclusionary Rule*, 69 J.Crim.L. and Criminology 635 (1978); *C. Wright, Must the Criminal go Free if the Constable Blunders?* 50 Tex.L.R. 736 at 740 (1972). Justice White summarized his analysis with a suggestion for modification of the rule and a good faith exception:

> "The rule has been much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither *Weeks v. United States* nor *Mapp v. Ohio*. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief."
>
> *Id*, at 538

See, also, ALI, Model Code of Pre-Arraignment Procedure §§558.02(2), (3), pp. 23-24 (Tent. Draft No. 4 1971).

In the case at bar the good faith exception as explained by Justice White is both squarely applicable and manifestly appropriate. *Where the concientious and very experienced Florida trial judge and two highly respected members of the Florida Appellate Court agreed that the officers' actions were constitutionally reasonable and correct it is totally untenable to suggest that the rule is any rational deterrent in circumstances like those in the case at bar.* This conclusion

is *manifest* in view of Detective Johnson's own response to the question of his good faith:

"Q. [By Mr. Block] All right. Now, basically, your main duty is to try to interrupt contraband from going into the airplanes and going into interstate commerce; is that not correct?

"A. Yes, sir.

"Q. And in your investigation you're mainly concerned with securing the contraband more than you are concerned with whether or not you have a proper arrest; is that not correct?

"MR. McMASTER: your Honer, I am going to object to that.

"THE COURT: Overruled.

"A. [Continuing] Absolutely not.

"Q. [By Mr. Block] Now, didn't you indicate in this case that you weren't so concerned about the arrest, but you were concerned about securing the contraband to keep it from going into commerce?

"A. No Sir. A civil lawsuit is not worth my job."

57A-59A.

See, also, 73A-74A. It is apparent that the exclusionary rule was not a deterrent to Johnson because he believed that he was lawfully performing his duty, consistent with his training and experience. What *was* a substantial deterrent however, was the possibility of a civil lawsuit. *See,* §768.28 Fla.Stat.

(waiver of sovereign immunity); *compare, Bivens*, 403 U.S. at 422-424 (Burger, J., *dissenting*).

Throughout its brief in the Court below, the undersigned vigorously argued the good faith of the officers in responding to the circumstances as they perceived them in their training and experience. *See, State Brief en banc*, pp. 38-39; 50-54; 58-72. Johnson painstakingly detailed each step in their observations of the Defendant and how their training and experience, objectively and reasonably suggested that they should act rather than shrug their shoulders and let crime and the criminal go undetected. The officers conduct with the Defendant was furthermore courteous, and conversational and in no way could be said to be egregious.

Justice White's suggestion and observations are eminently sound. This Court should adopt the good faith exception. As previously noted at least four Justices currently sitting on this Honorable Court have expressly urged that a good faith exception to the exclusionary rule as delineated by Justice White should be adopted. *See, Ball, supra*, at 635. In *United States v. Williams*, 622 F.2d 830, at 840-847 (5th Cir. 1980) (en banc), *cert. den.*, 449 U.S. 1127 (1981), thirteen judges of the Court, noting Justice White's views in *Stone v. Powell*, have expressly adopted the "good faith" exception holding:

> "Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence."

Id at 846-847.

The good faith exception also has a sound basis in the recent substantive law of this court. *See, Michigan v. DeFillippo*, 443 U.S. 31 (1979) (arrest made in good faith reliance upon constitutionality of statute upheld); *United States v. Peltier*, 422 U.S. 531 (1975) (no deterrent value in retroactive application of exclusionary rule to search later found to be unconstitutional); *Michigan v. Tucker*, 417 U.S. 433 (1974) (because police officer acted in good faith the exclusionary rule lost "much of its force"); *Brown v. Illinois*, 422 U.S. 590 (1975) (where police officer knew arrest was unlawful the exclusionary rule should particularly be applied). Florida would apply such a rule if this Court provided the authority. *See, Walden v. State*, 387 So.2d 368 (Fla. 1st DCA 1981) (Mills, C.J., *specially concurring*); *see also*, Section 16-3-308 Colo. Stat., adopted July 1, 1981 (establishing good faith exception). As clearly demonstrated herein and in the substantive law and commentary, the rule is without a lawful basis in circumstances such as the case at bar. *Compare also, Major v. State*, 389 So.2d 1203 (Fla. 3d DCA 1980) (reversed on rehearing after *Royer*, finding no consent at all despite overt manifestations of Defendant to contrary and Defendant was warned of his right to refuse). In the words of the Chief Justice in *Bivens* the rule should be modified and permitted to further evolve as is the great tradition of the common law:

> "Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct."
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> 403 U.S. at 420.

2) THE MERE APPROACH AND CONVERSATION OF INVESTIGATING LAW ENFORCEMENT OFFICERS IS NOT PROHIBITED BY THE FOURTH AMENDMENT.

Subsequent to *Terry v. Ohio*, 392 U.S. 1 (1968) a substantial body of opinions have developed holding that a law enforcement officer may begin an investigation by seeking the cooperation of the subject of the investigation and that such a contact does not give rise to any constitutional prohibitions.[4] *See, also*, 3 La Fave, *Search and Seizure, a Treatise of the Fourth Amendment* Section 9.2, (g) at 46-57 (1978); ALI Model Code of PreArraignment Procedure, Section 110.1, PP157-161 (Proposed Official Draft, adopted May 20, 1975). Additionally, in *Schneckloth v. Bustamonte*, 412 U.S. 218, 230-231 (1973), the Court again noted that:

> "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. *Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an*

[4] *See, e.g., United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979) (the momentary possession of the defendant's ticket is *not* a "stop"; the officers acquired articulable suspicion through the defendant's false identification prior to walking away the defendant's ticket); *United States v. Price*, 599 F.2d 494, 498 (2d Cir. 1979); *United States v. Wylie*, 569 F.2d 62 (D.C.Cir. 1977); *State v. Shy*, 373 So.2d 145 (La. 1979); *People v. Kennedy*, 66 Ill. App.3d 267, 383 N.E.2d 713 at 718-719 (1978) (merely that a police officer engages an individual in conversation and no restraint has been placed upon the individuals freedom to walk away, does *not* constitute a "stop" even though the encounter was investigative in nature); *State v. Thompson*, 296 N.C. 703, 252 N.E.2d 776 at 778 (1979) (no one is protected by the constitution against the mere approach of police officers in a public place).

implied assertion of unlawful authority. [Quoting *People v. Michael*, 45 Cal.2d at 754, 290 P.2d, at 854, Traynor, J.]." [Emphasis added.]

Finally and perhaps most instructive herein, the Supreme Court in Schneckloth in fact rejected the "coercion-from-courtesy" test of constitutionality:

> "[In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970)] the court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. *We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police.* "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." Id., at 488, 91 S.Ct., at 2049. [Emphasis added].
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> *Id* at 233, n.15.

In *United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980) the defendant had claimed that the mere approach and conversation of law enforcement officers at the Detroit Metropolitan Airport was a seizure. In rejecting the defendant's claim, Justice Stewart writing for the Court specifically articulated the mere contact concept:[5]

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[5]The contrary view is presented in *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) wherein the Court held that:

> "In applying these standards to airport searches like the one involved in this case, many courts have held that a Fourth Amendment stop occurs as soon as officers initially approach an individual, identify themselves, and begin to question him.
>
> * * *

"We adhere to the view that a person is "seized" only when by means of physical force on a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 4081, 49 L.Ed.2d 1116.

* * *

"The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See, *Terry v. Ohio, supra* 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring). See also A.L.I., Model Code of Pre-Arraignment Procedure §110.1(1) and commentary at 257-261. In short, nothing in the record suggests that the respondent had any *objective* reason to believe

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(Footnote 5 Continued)

> We are attracted by the reasoning contained in these decisions, but we need not go nearly so far in resolving the problem presented in this case."

The Court herein declined to disapprove of the Frost dicta. See, 389 So.2d 1018, at 8; *see also, e.g., Correa v. State,* 389 So.2d 1204 (Fla. 3d DCA 1980) (assuming mere approach of a police officer is a show of authority); *Monohan v. State,* 390 So.2d 756 (Fla. 3d DCA 1980) (assuming after *Royer* that the approach of police officers is a stop). The dicta in *Frost* has been given force of law in Florida.

that she was not free to end the conversation in the concourse and proceed on her way, *and for that reason we conclude that the agent's initial approach to her was not a seizure."*

Id, at 1877.

The *Mendenhall* Court then analyzed the transaction and found that it had none of the trappings of a seizure:

"On the facts of this case, no "seizure" of the respondent occured. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence. [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionality protected interest."

Id, at 1877.

In further analysis the *Mendenhall* Court also rejected the analysis in *Frost,* and implicit in the *Royer* opinion herein:

"Our conclusion that no seizure occurred is not affected by the fact the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses do not depend upon her having been so informed. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 054. *We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions.* It

may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

"The Court's decision last Term in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, *on which the respondent relies, is not apposite.* It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. *In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him,"* id., at 49, 99 S.Ct., at 2639. *UP TO THIS POINT THERE WAS NO SEIZURE.* But after continuing to protest the officer's power to interrogate him, Brown was frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer 'who has lawfully stopped him and requested the information.'" [Emphasis added].

Id, at 1878.

Accord, e.g., United States v. Fry, 622 F.2d 1218 (5th Cir. 1980); *United States v. Elmore; United States v. Wylie, supra,* at n. 4.

In the case at bar, *as in Mendenhall,* the events 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant 4) but instead the officers approached him and identified themselves 5) requested but did not demand the Defendant's identification and ticket and 6) the officers

posed a few questions, *the primary of which was the false identification the Defendant had given* (the same circumstance as in *Mendenhall*). *See*, 40A-45A. In correctly balancing the compelling needs of society for effective law enforcement against the minimal intrusion if any herein, this Court should also consider that the primary consideration of a narcotics officer in the present circumstance is to identify himself to alleviate the possibility of sudden violence from a nervous courier who doesn't want to be "ripped off" and left in the trunk of an automobile in the Everglades. The *sudden* and *brutal* violence of drug traffic in South Florida cannot be *gainsaid*. See, PA1-PA68. As the Court stated in *United States v. Garcia*, 450 F.Supp. 1020, at 1024 (E.D.N.Y. 1978):

> "Given the gravity of the offense suspected, the ease with which narcotics may be disposed of, and the difficulty, almost impossibility, of later tracing the suspect, the agents were at least entitled to make a polite request for defendant's identification and airline ticket. To put it another way the facts suggested a sufficiently high probability of guilt to ask even a blameless man to identify himself. *Merely to require identification from an innocent person whose actions by coincidence fit the pattern from which serious crime may reasonably be suspected is not to exact a disproportionate or unreasonable price.*" [Emphasis added].

The overwhelming weight of the foregoing authority and the wisdom of the panel decision in the case at bar, as manifestly concurred in by the *Schneckloth* and *Mendenhall* courts is directly applicable to the present circumstance. No one is protected by the constitution from the mere approach of and voluntary conversation with a police officer. The Defendant's fundamental premise therefore fails.

3) THERE IS SUBSTANTIAL COMPETENT EVIDENCE, WHICH THE TRIAL COURT CHOSE TO BELIEVE, THAT THE DEFENDANT FREELY AND VOLUNTARILY CONSENTED TO THE ENTIRE TRANSACTION.

Given the conclusion that there was never a primary illegality in the case at bar, this Court need only examine the nature and extent of the evidence before the trial court to determine that the evidence herein was sufficient to sustain a finding of voluntariness as to the remainder of the transaction. *See, Mendenhall,* 100 S.Ct. at 1878-1879. The question of voluntariness is a question of fact to be determined, *not* from facts taken in isolation, but rather from the light of *all* of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

In the case at bar, the trial court was presented with conclusive, salient evidence, *which it chose to believe,* showing that the Defendant consented and the voluntariness of the Defendant's consent: 1) the Defendant was shown to be a twenty-two (22) year old, adult male; 2) the Defendant is a college graduate; 3) the detectives approached the Defendant and asked him if he had a moment to talk; 4) the Defendant voluntarily provided his identification and ticket; 5) the detectives asked if he would accompany them to the other area a few feet away; 6) the Defendant was asked if he would consent to the search; 7) the Defendant produced the key for one bag and said it was okay to open the other bag and 8) the entire transaction was conversational, courteous and polite and the Defendant had no physical impairments; appeared lucid and alert and understood everything. In addition to these factors, the officers wore no uniforms and displayed no weapons. There is no evidence of overt coercion, youth, lack of education, low intelligence; harsh questioning or use of force.

The Florida District Court of Appeal in response to the foregoing substantial evidence of consent, flatly claimed that the Defendant's consent was tainted because 1) the Defendant was told that the officers suspected him of transporting narcotics; 2) that the Defendant "silently acquiesced" and moved with the officers to the "police room"; 3) that the Defendant's ticket was retained and 4) that the Defendant's luggage was "stopped" without the Defendant's permission. *Id* at 1016-1020. The District Court concluded that therefore the Defendant was *arrested. The Defendant subjectively testified however that he was not under arrest in the room. See,* 86A. Additionally, the *Defendant* was not affected by any of the matters noted in the District Court's reassessment of the facts *and did not subjectively point to any of these grounds in his testimony. See,* 81A-84A; 86A. He testified only that he did what he did, "because they were police officers." 81A-82A, *see,* 83A-84A; 86A. The Defendant stated no other reason for his claim of a detention. Consistent with the State's first argument above, we are here arguing in an ivory tower, matters, which the Defendant and the police officers never imagined. The Defendant overtly manifested consent to the officers in a "spirit of apparent cooperation." The officers were entitled to rely upon such manifestations of consent in the case at bar. This Court should not years later permit the Defendant who revealed all, now suddenly state that he acted only in response to a subjective implied assertion of authority. *See, Schneckloth,* 412 U.S. at 230-231.

The District Court's singular focus upon whether or not the Defendant was illegally detained is a failure to apply the proper standard, the "totality of the circumstances" test under *Schneckloth.* In *United States u Watson,* 423 U.S. 411, at 425 (1976) the Court held that the fact of an arrest alone has never been sufficient to vitiate consent. In *Mendenhall* the court rejected "mere silent acquiescence" and movement to a room nearby, as neither factors establishing an arrest nor vitiating a lawful consent:

> "The District Court specifically found that the respondent accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation' quoting *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1903, 20 L.Ed.2d 917. Notwithstanding this determination by the trial court, the Court of Appeals evidently concluded that the agent's request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful. But because the trial court's finding was sustained by the record, THE COURT OF APPEALS WAS MISTAKEN IN SUBSTITUTING FOR THAT FINDING ITS VIEW OF THE EVIDENCE. *See Jackson v. United States*, 122 U.S. App.D.C. 324, 353 F.2d 862 (1965)."
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> 100 S.Ct. at 1878.

As did the federal Circuit Court in *Mendenhall*, the Florida District Court of Appeal herein was also mistaken in substituting its judgment for that of the trier of fact.[8] *Compare also, Major v. State, supra* (reversed on rehearing after *Royer* finding no consent despite Defendant's overt manifestations to the contrary). *A finding of consent should not be overturned "unless clearly erroneous". See, e.g., United States v. Price*, 599 F.2d 494, at 504 (2d Cir. 1979). The evidence was not simply so overwhelming that either this Court or the District Court should intrude and overrule the trier of fact. The District Court has applied the *extraordinary* standards of review of consent, which was rejected in *Schneckloth*, to defeat any State prosecution based upon consent. As reflected in *Edwards v. Arizona*, ____ U.S. ____, 101 S.Ct. 1880 (1981), this is a patently erroneous standard of review under the Fourth Amendment.

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[8] In addition to the characterization of "silent acquiesence" the reference by the *Royer* court to "the police room" is also not supported in the record. Johnson specifically testified that it was *not* a "police room" and had no "police" trappings whatsoever. *See*, 45A-46A.

4) THE DEFENDANT'S LUGGAGE HAD NO CONSTITUTIONAL RIGHT NOT TO BE STOPPED.

As noted above, the Florida District Court placed great emphasis upon the fact that the officers retrieved the Defendant's luggage. *See*, 389 So.2d at 1017-1018. Johnson indicated that he asked for consent and to open the suitcases and that after the conversation with the Defendant Johnson went and got the bags. *See*, 74A, 46A-48A. Any transaction regarding the bags should also be sustained on the consent theory.[7] Alternatively, as discussed below, the bags were properly "stopped" after the Detectives had reasonable suspicion for the "stop" of luggage. *See*, *United States v. West*, 651 F.2d 71, at 74 (1st Cir. 1981). The "stop" was also proper in considering the exigency of the situation, the needs of the public and law enforcement as weighed against such a minimal intrusion. *See*, *Mendenhall*.

The State submits, however, that the "stop" of the Defendant's bag is not a constitutional event and should be governed by the doctrine of "so what?" *See*, Moylan, Charles E., "The Threshhold Question of the Application of the Fourth Amendment or the Doctrine of 'So What?'," 75 So. Ill. L.J. 118 (June, 1977). It is well settled that the Fourth Amendment protects the privacy of persons and not things or places. *Cardwell v. Lewis*, 417 U.S. 583, 588 (1974); *Warden v. Hayden*, 387 U.S. 294, 304, (1967); *Nixon v. Administrator of General Services*, 408 F. Supp. 321, at 358 (D.C.D.C. 1976). The State submits that *absent* a concurrent "seizure" of the person in the thing, a "seizure" of the thing for further

[7]Metropolitan Dade County is the owner through its offices of the premises of Miami International Airport. *Burton v. Dade County*, 166 So.2d 445 (Fla. 1964); *North American v. Byrd*, 61 So.2d 198 (Fla. 1952); *Miami Beach v. Crandon*, 159 Fla. 504, 32 So.2d 153 (1947). By virtue of its ownership, Metropolitan Dade County and its officers have an unqualified right of access to the premises.

investigation is without constitutional impact. *See, United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 807 (1970); *see, also, United States v. Outland*, 476 F.2d 581 (6th Cir. 1973). In *Van Leeuwen, based upon mere viceral suspicion*, a first class mail package for domestic delivery was detained for more than twenty-six (26) hours until additional facts could be gathered to obtain a warrant. The *Van Leeuwen* court held that there was no constitutional interest invaded by holding the "thing" pending further investigation to raise sufficient facts for a warrant. 397 U.S. at 252. *See, also, United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981) (movement of bag for dog sniff is not a seizure).

Furthermore, where as in the case at bar, the Defendant has given up his bag to a third party, even as a bailee, the thing is lawfully subject to police scrutiny. *Cardwell v. Lewis, supra.* In *Cardwell*, the court upheld a detailed police examination and the taking of paint scrapings and other incriminating physical evidence from the defendant's car where the defendant had left his car in a public parking lot. 417 U.S. at 591-592; *see, also, Alderman v. United States*, 394 U.S. 165 (1969) (The Fourth Amendment does not protect those persons engaged in crime from risk that those who they communicate with or associate with will cooperate with the police); *Frazer v. Cupp*, 394 U.S. 731 (1969), (consent of third party to examination of the thing is without constitutional impact); *United States v. Novello*, 519 F.2d 1078 (5th Cir. 1975); *cf., also, Hester v. United States*, 265 U.S. 57, 58 (1924) ("open fields" doctrine).

5) THE DETECTIVES HAD ARTICULABLE SUSPICION FOR A BRIEF DETENTION OF THE DEFENDANT FOR FURTHER INVESTIGATION AND/OR PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT WAS ATTEMPTING TO TRANSPORT ILLICIT NARCOTICS THROUGH MIAMI INTERNATIONAL AIRPORT.

The State submits that the Defendant was not detained or seized at any point. In *Mendenhall* the Court noted that in *Terry* the Court did not consider that the Defendant was seized until he was actually physically restrained. The *Mendenhall* court concluded that:

> "We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was not free to leave.[8] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
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> *Id,* at 1877.

In the case at bar, the conversation was plainly conversational in tone; the officers were in plain clothes; all inquiries were requests rather than demands and there was no physical contact. Under *Mendenhall,* there was no detention

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[8]The reasonable person standard is of course, "a reasonable [person] *innocent* of any crime." *United States v. Wylie,* 569 F.2d 62 at 69-70 (D.C. Cir. 1977).

or seizure within the meaning of the constitution. *United States v. Elmore*, 595 F.2d 1036, at 1042 (5th Cir. 1979), *cert. den.*, 447 U.S. 910 (1981), *see also*, *United States v. West*, 651 F.2d 71, at 73 (1st Cir. 1981).

The officers conversational statement that they had reason to believe that the Defendant was transporting narcotics did not automatically convert the transaction to a seizure. Certainly such information was not an accusation in the conversational tone of the transaction, but rather was only a natural part of the investigation of the circumstances as the officers saw them. The State submits that in any police encounter, the *innocent* citizen may be naturally be curious and inquire as to why the police may wish to speak with him. The citizen *innocent* of any crime would offer an explanation or even inquire further. The person *innocent* of any crime would offer his bag for examination or even demand to know why he was suspected of carrying narcotics. The *innocent* person would certainly not feel compelled by such a mere statement. To ostracize and isolate law enforcement officers from what is obviously only voluntary discourse with citizens on the street; requiring that they only approach persons that they don't think have committed a crime, is not required under the Fourth Amendment and serves only to strain the Constitution through a filament of unrealistic exactitude. *Terry v. Ohio.*

Similarly, the District Court's focus upon what it perceived as the retention of the Defendant's plane ticket, relying upon *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) is erroneous. In *Frost*, which was *a state appeal*, the court *held* that because it was a state appeal, and the appellate record *failed to show* that the defendant's license and airline ticket were *immediately* returned to the defendant, the Court would *assume* the ticket and license were not immediately returned. *Id*, at 595-596, 598. *The Frost Court concluded that therefore automatically, a "stop" had been effected by*

the officers, despite substantial evidence to the contrary. Id at 598; *contra, United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979). In its holding the *Frost* severely criticized the United States Fifth Circuit Court of Appeals in *Elmore*, for what the *Frost* court viewed, as *holding*, "that it makes a constitutional difference as to the restraint of one's liberty whether an officer with a traveler's ticket in his hand remains face to face with the individual or walks away from him," *and holding*, that the fruits of an unlawful search or seizure [can] retroactively serve to sustain it." *See*, 374 So.2d at 598, n. 4. *Contrary* to Frost *Elmore* approved the "mere contact" concept and further held that in the transaction with the defendant there was no siezure of the defendant until agent Markonni *walked away* with the defendant's ticket.[9] 595 F.2d at 1040-1042.

In the case at the ticket never left the Defendant's presence and was left with him when Detective Johnson retrieved the bags. *See*, 71A. Johnson testified that he held the ticket in the absence of a request for its return. Under *Elmore*, where the ticket was not taken from the Defendant's presence, there is no constitutional seizure. This conclusion is particularly appropriate in view of the fact that the trial court did find that the transaction was voluntary in the totality of the circumstances. Again, the State submits that an *innocent* person would as Detective Johnson implied asked for his ticket back. If the Defendant had asked for his ticket back and refused to permit an examination of his bag, then the officers would have had to make a choice at that

[9]*Elmore*, is now generally cited as the correct statement of *the law* in the United States Fifth Circuit. *See, e.g., United States v. Williams*, 647 F.2d 588 (5th Cir. 1981); *United States v. Moeller*, 644 F.2d 518 (5th Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Lara*, 638 F.2d 892 (5th Cir. 1981); *United States v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1121 (5th cir. 1980); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Fry, supra.*

point to detain the Defendant or not. Merely that the Defendant, who was clearly guilty, cooperated out of the fear that refusal would intensify suspicion or because of "subjective forces impell[ing]" him to cooperate does not rise to constitutional significance. *See, Schneckloth*, 412 U.S. at 233, n. 15. This result should particularly obtain in the case at bar when considering the grave public interest involved and the minimal and momentary intrusion in transactions like the present case. *See, United States v. Mendenhall.* Additionally as discussed below, Miami International Airport is the functional equivalent of a border for these officers. Within minutes the Defendant would be gone forever. With such a specialized and compelling government interest in stemming narcotics traffic the intrusion if any here is constitutionally reasonable. *Id., see, also, United States v. Cortez*, ____ U.S. ____ ,101 S.Ct. 690 (1981).

Finally, the District Court's adamant focus upon the movement forty feet to the room as making the transaction an arrest is also erroneous. First of all *Mendenhall* makes it quite plain that movement alone does not even make a voluntary transaction, not voluntary. Secondly, assuming a brief detention for movement to the room, any detention of the Defendant for further investigation did *not* rise to an arrest simply because of limited *movement* to a room forty (40) feet away. *Mendenhall.* The movement to the room did not become an arrest, where danger to the public in a crowded airport and avoiding possible embarrassment to the Defendant are among legitimate law enforcement concerns[10]

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[10]See generally, United States v. Vasquez-Santiago, 602 F.2d 1338, at 1971 (2d Cir. 1979), *United States v. Smith*, 574 F.2d 882, at 884 (6th Cir. 1978); *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977) ("it was not improper * * * to arrange that [the interrogation of a suspect stopped in the airport] take place free from public view with its attendant embarrassment"); *United States v. Oates*, 560 F.2d 45, at 57 (2d Cir. 1977) (proper to move suspects into a nearby office, a place more conducive to insuring the safety of other passengers in the crowded departure area); *United States v. Van Lewis*, 409 F. Supp. 535, at 545 (E.D.Mich. 1976)

and where the transaction lacks any traditional indicia of an arrest and the Defendant subjectively stated that he was *not* under arrest in the room. *See, Michigan v. Summers*, ____ U.S. ____, 101 S.Ct. 2587 (1981). The District Court's reliance upon *Dunaway v. New York*, 442 U.S. 200 (1979) for the principle that any movement is an arrest, is misplaced. In *Michigan v. Summers, supra*, the Court rejected any absolute view of *Dunaway* explaining that:

> "Although we refused in *Dunaway* to find an exception that would swallow the general rule, our opinion recognized that some seizures significantly less intrusive than an arrest have withstood scrutiny under the reasonableness standard embodied in the Fourth Amendment. In these cases the intrusion on the citizen's privacy "was so much less severe" than that involved in a traditional arrest that "the opposing interests in crime prevention and detection and in the police officer's safety" could support the seizure as reasonable."
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> *Id.*, at 209.

In *Dunaway* the defendant was physically driven away to the police station rather than merely moving a few feet as in the case at bar and was detained for more than two hours as opposed to the ten or fifteen minutes in the case at bar. The present cause is much less severe than that presented in *Dunaway* and is further justified by clearly reasonable law enforcement interests. Clearly under *Summers* the seizure herein did *not* become an arrest.

(Footnote 10 Continued)

("There are many cogent reasons for not interrogating travelers in the hustle and bustle of the airport's public areas. These involve the safety of both parties, the ability to converse effectively, the embarrassment to the person detained, and others.").

Furthermore, the *Summers* Court, in further rejecting any absolute rule under *Dunaway*, reviewed *Terry; United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) and *Adams v. Williams*, 407 U.S. 1921 (1972) and further cited *United States v. Cortez* ____ U.S. ____, 101 S.Ct. 690 (1981) and concluded that special law enforcement interests could justify seizures on less than probable cause, which were more than just a momentary *Terry* stop. *Id*, at 2592-2593. The Court noted that the examination should be as to the character of the intrusion and its justification. The essential error in the present cause is that the Florida Court did not properly apply this essential balancing test in its analysis. Under *Summers*, the character of the official intrusion is so minimal that in *Mendenhall*, as in the case at bar, the Court found the entire transaction to be voluntary. Similarly, the justification for the minimal intrusion in the case at bar is paramount:

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

Mendenhall, 100 S.Ct. at 1881 (Powell, J., Burger, J., Blackmun, J., *concurring*); *see also*, PA1-PA67. The special law enforcement interests herein do justify a seizure on less than probable cause.

If on the other hand, the officers had chosen to detain the Defendant their actions would have been constitutionally

reasonable. An officer is entitled to rely upon his *training* and *experience* to ascribe suspicious significance to the whole of a circumstance and suspicious significance to behavior that might appear wholly innocent to an untrained observer. *Mendenhall*, 100 S.Ct., at 1882 (Powell, Burger, Blackmun, *concurring*). *Brown v. Texas*, ____ U.S. ____, 99 S.Ct. 2637, at 2641, n. 2 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In *United States v. Van Lewis*, 556 F.2d 385 at 389 (6th Cir. 1977), the court observed that in weighing the arrest of an airport narcotics courier, "probable cause is the sum total of [the] layers of information and the synthesis of what the police have heard, what they know and what they observe as trained officers. We weigh not individual layers, but the laminated whole"; *see also, e.g., United States v. Elmore*, 595 F.2d 1036, at 1038, 1042 (5th Cir. 1979), (false name given to airline, sufficient articulable suspicion); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Mays*, 524 F.2d 803, at 806 (9th Cir. 1975); *United States v. Richards*, 500 F.2d 1025 at 1029 (9th Cir. 1974), (false and evasive statements, warrant suspicion criminal activity was afoot).

In the case at bar, the eventual arrest of the Defendant was *not a random circumstance*. Based upon their experience and training in the narcotics courier profile and their actual observation of facts derived from the profile, Detectives Johnson and Magdelena were *absolutely correct* in their conclusion based upon their specialized training and experience and observations, that the Defendant was transporting narcotics.

The Detectives in the case at bar had objective articulate facts, which they could point to as probability that the Defendant was committing a felony consisting of, 1) casual dress; 2) twenty-five to thirty-five years old; 3) one way ticket; 4) paying for ticket in *cash only*; 5) using no identification; 6) using no other means of identification such as credit cards or checks; 7) traveling to a "target" city; 8) carrying American

Tourister luggage; 9) placing false identification on the luggage labels required by federal airline regulations and 10) carrying large amounts of cash. *Additionally,* Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. *See also, United States v. Regan,* D.Ct. Case No. 81-88K, June 30, 1981 (D. Mass. 1981) (PA68-PA70). The Defendant's *testimony did not dispute these material observations of the Detectives.*

When the Detectives verified the false identification, the Defendant failed to dispell their alarm. *The Defendant's explanation that he had not made the reservation was not an explanation as to why he would continue the charade with the airline by placing a false name on his luggage.* Indeed, at the hearing on the Motion to Suppress, the Defendant in fact refused to testify as to who he claims made the airline reservation and refused to testify as to whether "Holt" exists or not. *See,* 90A-91A.

Furthermore, together with the alias and the other observed facts from the profile the Detectives also had the articulable fact that the Defendant was concerned about being detected. *See, United States v. Price,* 599 F.2d at 500 (defendant looking about); *United States v. Vasquez,* 612 F.2d at 1339 (conduct in looking about indicative of fear of detection); *United States v. Elmore,* 595 F.2d at 1038 (apparent anxiety of defendant at being followed); *United States v. Regan,* Case No. 81-88K June 30, 1981 (D. Mass. 1981) (fear at being followed). PA68-PA70, PA80). Also, the Defendant's peculiar conduct and the Detectives observations were made in an area of Miami nationally known for its high incidence of narcotics crime; *which is itself an articulable fact. Brignoni-Ponce,* 422 U.S. at 884-885.

The focus of this Court's analysis, of articulable suspicion and probable cause must be, as the District Court panel's focus was, upon the nature of the offense. There are no eyewitness or bodies, no fingerprints, no forged checks and no stolen property, which the police can point to for probable cause. The crime in this case is purely one of *stealth*, in which the skill and training of these officers must be effective in just a few minutes. *The single and overwhelming purpose of drug couriers to sneak through Miami International Airport by avoiding detection.* The failure to provide proper identification to the airlines is a violation of air travel regulations. The Defendant will argue that this is just a small untruth. *However, the State submits that the concerted effort to avoid identification is of particular and lawful significance to these trained narcotics officers. See, United States v. Elmore*, 595 F.2d 1036, at 1039 (5th Cir. 1979); *see also, United States v. Patino*, 649 F.2d 724, at 727-728 (9th Cir. 1981); *State v. Brant*, Ga. Super. Ct. Case No. A51531, December 4, 1980 (alias) (PA94-PA96). In *Elmore*, the Court specially held that the *observed* facts from the profile, together with the use of an alias *required* that the officers detain the defendant for further investigation:

> *"It would have been a failure of duty had the federal agents not detained Elmore at that point in order to investigate further."*
> 595 F.2d at 1039.

Under *Elmore*, *Mendenhall* and the analysis of probable cause in *United States v. Cortez*, when the detectives discovered the Defendant's alias, they had *at least* reasonable, articulable suspicion and grounds for a seizure of the Defendant under *Summers*, in order to conduct further investigation. It was plainly more likely than not in their training and experience, together with their actual observations that the Defendant was transporting narcotics. The District Court's denial of the validity of their training and experience is plain error under *Mendenhall* and the substantive law.

The development and court approval of the hijacker profile in early airport security programs was an accepted and effective law enforcement response to the deadly serious problem of airplane hijacking. *See, e.g., United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973), *cert. dismissed*, 415 U.S. 902 (1974); *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). Similarly, a "smuggling profile" has been properly and successfully used by the United States Customs Service. See, *United States v. Forbicetta;* 484 F.2d 645 (5th Cir. 1973); *see also, United States v. Asbury*, 586 F.2d 973, 976-977 (2d Cir. 1978); *United States v. Kallevig*, 534 F.2d 411 (1st Cir. 1976); *see also, State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976) (stolen car profile). Informal profiles are used in other disciplines. A doctor making a diagnosis compares observed symptoms to a profile of characteristics exhibited by various diseases. Use of a "profile" is a legitimate method of using one's experience in an organized fashion to assess the likelihood of a particular conclusion. Calling that collective training and experience a "profile" should not prohibit its practical use.

There is, *sub judice*, no justification for a general rule rejecting the use of any "profile". Merely that an officer has written down the characteristics he finds are reliable indicia of criminality should not sway a determination that trained *observations* of those criteria are probable cause. For example an officer may write down as a "robbery profile," that if he observes someone waving a gun in a bank that it is more likely than not that a felony is in progress. Certainly, no court would vitiate the officer's probable cause, because he wrote it down.

In the case at bar, under the facts and circumstances known to the Detectives, the Defendant's alias and failure to dispell the Detectives' alarm that he was in fact a narcotics courier, combined with the other facts developed from the

profile, established *a reasonable belief in these Detectives as trained observers that there was at least reasonable suspicion to believe he was transporting narcotics. See, United States v. Mendenhall*, (Powell *concurring*). *See*, 389 So.2d 1008; 1012 (Panel opinion), *see also, United States v. Price*, 599 F.2d 494, at 504 (2d Cir. 1979), (Lumbard, J., *concurring:* the facts developed from the drug courier profile were *probable cause* to search the defendant's luggage without the defendant's consent). The fact that the Detectives herein derived their cumulative observed facts in this case from the characteristics of the profile does not vitiate a finding of articulable suspicion or probable cause for the Defendant's arrest. *See, United States v. Mendenhall*, (Powell *concurring*); *United States v. Price, supra; United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Van Lewis*, 556 F.2d 385 (2d Cir. 1977); *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. den.*, 434 U.S. 878 (1977); *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *cert. den.*, 384 U.S. 1008 (1966); *United States v. Garcia*, 450 F.Supp. 1020 (E.D.N.Y. 1978); *see also, United States v. Brignoni-Ponce*, 422 U.S. at 883-884, (investigative stops of limited duration are acceptable at a "border"); *Draper v. United States*, 358 U.S. 307 (1959), ("in dealing with probable cause as the very name implies, we are dealing with probabilities"). In *Mendenhall* Justice Powell in concurring examined the drug courier profile, the training and experience of the officers and their actual observations and circumstances in and concluded that:

> "The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. In applying a test of "reasonableness," courts need not ignore the considerable expertise that law enforcement

officials have gained from their special training and experience. The careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment."

As in *Mendenhall*, the officers' work herein was careful and commendable and should be sustained particularly in view of the specialized training and experience of the officers, considered together with the public interest in effective law enforcement.

6) THE SEARCH OF THE DEFENDANT'S LUGGAGE WITHOUT A WARRANT WAS JUSTIFIED AS EXIGENT OR CONTEMPORANEOUS WITH HIS ARREST.

The State submits that in the present circumstance, the luggage was mobile and it was reasonable for the officers to open the luggage, where within minutes, the luggage would leave the jurisdiction of a Florida magistrate and thus be lost forever. *See, United States v. Valen*, 479 F.2d 467 (3d Cir. 1973); *United States v. Mehciz*, 437 F.2d 145, 147 (2d Cir. 1971); *see, also, Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 Iowa L.Rev. 1134 (1973); Note, *The Warrantless Search of a Suitcase Carried by Arrestee Is Constitutionally Permissible Even Though There Is No Danger That the Arrestee Will Get To The Suitcase to Obtain a Weapon or Destroy Evidence*, 9 Houston L.Rev. 140 (1971). Certainly, as the panel herein noted, it is common knowledge that all luggage at an airport is subject to being searched at any time, where the passenger expects to board a plane.

Furthermore, it does not make constitutional sense to say that once an arrest is made that the *de minimus additional*

intrusion of a search of the things in the defendant's possession, where the contraband or stolen goods are known to be, cannot be *reasonably* made. *See, United States v. Robinson*, 414 U.S. 218, 235 (1973); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Arkansas v. Sanders*, ____ U.S. ____, 99 S.Ct. 2586, at 2594 (1979) (Blackmun and Rehnquist, JJ., *dissenting*); *United States v. Chadwick*, 433 U.S. 1, at 17-24 (1977) (Blackmun and Rehnquist, JJ., *dissenting*); *see also, Mobility Reconsidered and The Warrantless Search of a Suitcase, supra.* In *Chambers v. Maroney*, 399 U.S. at 51-52, the court remarked that:

> "Arguably because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.*"
> [Emphasis added].

See, also, United States v. Garcia, 605 F.2d 349, 352-360 (7th Cir. 1979), *cert. den.*, 446 U.S. 984 (1980) (affirming warrantless search of luggage incident to arrest). Once an intrusion has been upon an airport passenger so as to effect a detention and arrest, in *the airport passenger context*, an immediate search of that person's luggage is then only a *de minimus intrusion.* If the contraband isn't there, there's no intrusion at all and the person goes on his way. In the specialized airport setting such a specialized balancing test is constitutionally sound.

VII

CONCLUSION

In the evolution of the common law, it is time for this Court to modify the exclusionary rule and approve the "good faith" exception to the rule. The State further submits that the *prohibitions* of the Fourth Amendment to the United States Constitution find no application in the case at bar. The State would urge this Honorable Court in its deliberation to consider and balance, the compelling interest in stemming the increasing corruption of society from the growing tide of drug traffic and the professional, efficient and very effective law enforcement herein as against the *de minimus* intrusion, if any in the case at bar, upon *legitimate* airline passengers.

RESPECTFULLY SUBMITTED on this 1st day of February, 1982, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

/s/ Calvin L. Fox
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Assistant Attorney General